

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOHN HIGGINS

Claimant

VS.

ABILENE MACHINE, INC.

Respondent

AND

CONTINENTAL NATIONAL AMERICAN GRP

Insurance Carrier

Docket No. 225,539

ORDER

Claimant requests review of the August 21, 2006 Post-Award Medical Award entered by Administrative Law Judge Bryce D. Benedict.

ISSUES

The Administrative Law Judge (ALJ) granted claimant's request for post-award medical benefits, so that aspect of the Award is not in dispute. Thus, the ALJ's decision to grant claimant additional medical treatment is affirmed. Likewise, the ALJ assessed the court reporter fees against respondent and because that finding is not in dispute, it is therefore affirmed.

What is in dispute is the ALJ's decision to withhold any award for attorney's fees and expenses, other than the court reporter's fees incurred in association with this post-award request. In his Order, the ALJ specifically ruled that "[i]f the parties cannot agree on the amount of attorney fees due to Claimant [sic] counsel, then this issued [sic] shall be set for a hearing. The Court will not order the payment of expenses other than the costs of court reporters."¹ No further hearings were held and instead, claimant filed this appeal.

The claimant contends the ALJ erred in failing to grant his counsel's request for fees and expenses which were submitted by affidavit just a few days before the ALJ's Order

¹ ALJ Award (Aug. 21, 2006) at 3.

was issued. Claimant argues that K.S.A. 44-510k(c) should be read expansively and include not only photocopy and mileage expenses but expert's depositions fees as well. In essence, claimant advocates a system whereby respondent (and/or its insurance carrier) carries the entire financial burden of any post-award request for medical treatment.

In its brief to the Board, respondent advises that it takes no issue with the amount of claimant's request for attorney's fees. Rather, it only urges the Board to refuse to enlarge the plain language of K.S.A. 44-510k(c) and wholly deny claimant's request for reimbursement of expenses, thereby honoring precedent and affirming the ALJ.²

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant filed a post-award request for additional medical treatment. At the hearing, claimant's counsel announced that the issues to be addressed on that day were "[p]ost award medical benefits and attorney's fees."³ The balance of the hearing made no mention of the attorney's fee request, nor during the course of that hearing was there any documentation offered as to expenses or attorney time incurred.

On August 16, 2006, claimant's counsel filed an affidavit with the ALJ which reflects his time incurred in connection with the post-award request and \$1,064.47 in expenses. Of these expenses, \$905 reflect charges submitted and paid to Drs. Poole, Stein and Coleman for their reports and/or deposition time, all in connection with the claimant's post-award request.

On August 21, 2006 the ALJ entered a post-award order granting claimant's request for additional medical treatment. This same Order included the following finding:

If the parties cannot agree on the amount of attorney fees due to Claimant['s] counsel, this issued [sic] shall be set for a hearing. The Court will not order the payment of expenses other than the costs of court reporters.⁴

Claimant filed this appeal with the Board asserting the ALJ should have granted his request for attorney's fees including the request for reimbursement of expert fees incurred in connection with this post-award matter. Respondent does not contest the amount, nor

² Respondent's Brief (filed October 5, 2006).

³ P.A.H. Trans. at 4-5.

⁴ ALJ Award (Aug. 21, 2006) at 3.

the reasonableness of claimant's request for attorney's fees, \$2,287.50.⁵ Therefore, in the interest of judicial economy, rather than remand this matter to the ALJ for an Order, the Board finds that the ALJ's Post-Award Medical Award should be modified to include an Order directing respondent to pay claimant's counsel the sum of \$2,287.50.

Turning now to the heart of the parties' dispute, whether claimant is entitled to recover the cost of expert testimony, claimant acknowledges that the Board has *repeatedly* addressed this issue in recent years and consistently held that expert fees are not recoverable under K.S.A. 44-510k(c).⁶ Nonetheless, claimant earnestly argues that the Board's reference to the Code of Civil Procedure invalidates its rationale because-

"[t]here simply is nothing even remotely similar in civil practice to the system of requiring a respondent to pay an opponent's attorney in post-award litigation. Since there is no analogous proceeding in civil practice, a better analysis would evaluate the underlying purpose of the fee shifting mechanism of such proceedings."⁷

And because the respondent is responsible for post-award attorney's fees, regardless of success or failure, claimant maintains that same rationale should be applied to awarding expert witness fees.⁸

While claimant's argument is interesting, it ignores the balance of the Board analysis on this issue. In *Golden*⁹, the Board set forth its reasoning as follows:

K.S.A. 44-536(g) makes no reference to expenses. However, K.S.A. 44-510k(c) allows for the award of costs when post-award litigation occurs on a claimant's behalf. "Costs" as described in that statute are defined as including:

. . . but are not limited to, witness fees, mileage allowances, any costs associated with reproduction of documents that become a part of the hearing record, the expense of making a record of the hearing and such other charges as are by statute authorized to be taxed as costs. (Emphasis added.)

⁵ Under most circumstances, the Board will not consider issues that the ALJ has not been given an opportunity to address. However, the affidavit was filed with the ALJ in advance of the ALJ's issuance of the Order on August 21, 2006, and specifically because respondent takes no issue with the reasonableness of the attorney's fee, the Board finds it acceptable and more efficient to merely modify the Order.

⁶ *McIntire v. Master Air Control*, No. 179,977, 2005 WL 1046544 (Kan. WCAB Apr. 1, 2005); *Edwards v. Jim Mitten Trucking, Inc.*, No. 199,988, 2004 WL 2046730 (Kan. WCAB Aug. 27, 2004); *Golden v. Conagra Foods, Inc.*, No. 104,145, 2005 WL 1046543 ((Kan. WCAB Apr. 12, 2005); *Lane v. Boan Masonry Company, Inc.*, No. 268,372, 2005 WL 3030736 (Kan. WCAB Oct. 14, 2005)

⁷ Claimant's Brief at 4 (filed Sept. 18, 2006).

⁸ *Id.*

⁹ *Golden v. Conagra Foods, Inc.*, No. 104,145, 2005 WL 1046543 ((Kan. WCAB Apr. 12, 2005).

The language of K.S.A 44-510k(c) indicates that the list is not all inclusive and the Board has concluded that such things as attorney travel expenses including mileage, photocopying and telephone expenses may be considered as appropriate "costs." . . . However, the fees charged by physicians and other expert witnesses for consultations in anticipation of their presenting testimony at trial are generally not assessed as costs.¹⁰

The Board's decision to deny recovery for expert fees is based upon the statutory language and not based upon a borrowing from the Code of Civil Procedure. The Board's reference to Chapter 60 of the Civil Procedure Code merely illustrated the consistency of its ruling. Moreover, the Board's refusal to shift the expense of experts to respondent is consistent with the intent behind K.S.A. 44-510h(b)(2) which prohibits a claimant from using the unauthorized medical allowance to obtain a functional impairment rating, and K.S.A. 44-555 which allows the ALJ to assess reporter fees to any party, and K.A.R. 51-9-6 which allows the fee for a neutral physician's report to be assessed to any party.

In summary, the Board affirms the ALJ's conclusions as to the claimant's entitlement to additional medical benefits and respondent's responsibility for the court reporter fees. The Board also modifies the Post-Award Medical Award to include an award for the \$159.47 in costs and \$2,287.50 in attorney's fees itemized on claimant's affidavit. The Board further affirms the ALJ's decision to deny claimant's request for \$905.00 in expert witness fees and to assess the court reporter fees to respondent and its insurance carrier.

WHEREFORE, it is the finding, decision and order of the Board that the Post-Award Medical Award of Administrative Law Judge Bryce D. Benedict dated August 21, 2006, is affirmed in part and modified in part as set forth above.

IT IS SO ORDERED.

Dated this _____ day of October, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

¹⁰ *Grant v. Chappell*, 22 Kan. App. 2d 398, 916 P.3d 723, *rev. denied* 260 Kan. 992 (1996).

DISSENT

The undersigned Board Member would grant claimant's request to allow him to recover the cost of the expert fees associated with this post-award request. Claimant's counsel makes a compelling argument, in that claimants are continually put to the financial test in establishing their right to benefits, even on a post-award basis. The cost of retaining an expert to establish a claimant's entitlement to further treatment is no less necessary to a post-award request than the medical records are or the presence of one's attorney. Yet, the Board has consistently allowed the recovery of mileage and copy costs, but has refused to allow expert fees. Practically speaking, if the cost of retaining an expert to testify on one's behalf is not considered a recoverable expense, it may deter a claimant from requesting additional medical benefits. For these reasons, this Board Member would grant claimant's request for reimbursement of the \$1,064.47 in costs and expenses.

BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
D. Steven Marsh/Janell Jenkins Foster, Attorney for Respondent and its Ins. Carrier
Bryce D. Benedict, Administrative Law Judge